Are Your Assets Protected?

It often seems that in today’s litigious society, asset protection and wealth preservation are at risk more than ever.

Even though Oklahoma passed tort reform in 2011 to place limits on damages for pain and suffering at $350,000, a judge and jury still have the ability to award additional amounts for circumstances such as negligence, fraud and reckless disregard—all of which are usually non-insurable. So a defendant will have to pay the additional damages out-of-pocket. This should get the attention of medical, legal and business professionals who can be exposed to malpractice lawsuits.

Asset protection, whether from litigation or creditors, is becoming increasingly difficult, but there are still several planning techniques available for asset protection and wealth preservation. These include family limited partnerships, limited liability companies, wealth preservation trusts, spendthrift trusts, and special needs trusts.

First, identify what assets are already exempt under state law. These include retirement plans, your personal residence and certain life insurance products. After these assets are identified, consider other asset protection vehicles such as a family limited partnership (FLP), limited liability company (LLC), or a protective trust.

Through an FLP, the transferor of the property becomes the general partner and other family members are named as limited partners. As the general partner, the transferor manages the partnership and keeps control over the assets for the benefit of all the partners. The assets are generally protected from the claims of creditors. The court can issue a charging order which allows a creditor to receive a limited partner’s share of any distributions from the partnership. However, the general partner may withhold distributions until after the limited partner has settled the debt. FLP’s also have estate planning benefits such as saving estate and gift taxes through valuation discounts.

LLC’s essentially offer the same protection as an FLP. However, with an LLC all members have the same limited liability as do the limited partners. In addition, you can establish an LLC with a single partner.

Other vehicles available for asset and creditor protection are protective trusts. Oklahoma is the only state that allows for both revocable and irrevocable family wealth preservation trusts where individuals can transfer up to $1 million in assets. The income and appreciation from those assets are also protected should the value of trust grow to over $1 million. To qualify as a protective trust, the trust must have an Oklahoma corporate trustee or co-trustee. In addition, a majority of the assets held in the trust must be invested in Oklahoma-based assets. Oklahoma-based assets include stocks and bonds of an Oklahoma-based company, bonds or obligations of municipalities within Oklahoma, deposits and accounts at Oklahoma-based banks and real property located in the state. Another requirement is that the beneficiaries of the trust must be either the grantor’s spouse, parents, spouse’s parents, children or a charity. Married couples might consider creating two trusts, one for each, and sheltering up to $2 million in assets.
A spendthrift trust is another type of protective trust. A parent or grandparent transfers assets to an irrevocable trust to be managed by an independent trustee. The trustee has discretionary powers to pay out income and/or principal to a child or grandchild beneficiary. The trust agreement contains a “spendthrift provision” which protects the trust by preventing the beneficiary from encumbering the assets and prevents the beneficiary’s creditors from claiming against his interest in the assets. This type of trust protects the beneficiary from not only creditors, but also from divorce property settlements.

If you wish to protect family assets for the benefit of a disabled child, you might consider a special needs trust. With this type of trust, public assistance programs can be maintained for a disabled child after the parents or guardians have passed away. The trust holds assets that might have otherwise passed to the child through an inheritance, a settlement of a personal injury lawsuit or as a gift from a relative. By holding assets in a special needs trust with the child as the sole beneficiary, the child’s eligibility for public benefits can be preserved. In addition, the trust provides asset protection in that the trustee has absolute discretion to make income and/or principal distributions for the benefit of the disabled child.

We encourage you to visit with your attorney and your estate planning professionals to ensure that your wealth preservation and asset protection plans are complete.